FILED
AUG 13 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 08-55

In the Supreme Court of the United States

LOGIX COMMUNICATIONS, L.P., DOING BUSINESS AS LOGIX COMMUNICATIONS,

Petitioner,

v.

THE PUBLIC UTILITY COMMISSION OF TEXAS, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to The United States Court of Appeals For the Fifth Circuit

BRIEF IN OPPOSITION OF RESPONDENT AT&T TEXAS

JOSEPH E. COSGROVE, JR.
THOMAS J. HORN
AT&T Texas
400 West 15th Street
Suite 1030
Austin, TX 78701
(512) 870-5700

THEODORE A. LIVINGSTON
Counsel of Record
J. TYSON COVEY
KARA K. GIBNEY
Mayer Brown LLP
71 South Wacker Dr.
Chicago, IL 60606
(312) 782-0600

Counsel for Respondent AT&T Texas

QUESTIONS PRESENTED

Under the federal Telecommunications Act of 1996, incumbent local exchange carriers can be required to "unbundle" certain of their network elements by leasing them to competing carriers. The Federal Communications Commission decides which network elements must be unbundled, and under what circumstances, and state public utility commissions implement those rules. One FCC rule makes the unbundling of certain network elements turn, in part, on the number of "business lines" in the wire center where the network element is located. The Public Utility Commission of Texas issued a decision implementing that rule and the FCC's methodology for computing "business lines," agreeing with AT&T Texas' application of the FCC's rule. Petitioner appealed that decision to the district court and then the Fifth Circuit, both of which affirmed.

The questions presented are:

1. Whether the Fifth Circuit correctly determined that FCC Rule 51.5, which states that the "number of business lines in a wire center shall" include "the sum of all UNE loops," requires that all UNE loops be counted as business lines.

2. Whether the Fifth Circuit correctly determined that FCC Rule 51.5, which states that "business line tallies * * * shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line," requires that each 64 kbps-equivalent be counted as one business line.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Respondent Southwestern Bell Telephone, L.P., d/b/a AT&T Texas states the following: AT&T Texas is a wholly-owned subsidiary of AT&T Teleholdings, Inc. AT&T Teleholdings, Inc. is a wholly-owned subsidiary of AT&T Inc. AT&T Inc. is a publicly held company.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 29.6 STATEMENT ii

STATEMENT OF THE CASE 3

REASONS FOR DENYING THE PETITION 6

I. THERE IS NO CONFLICT REGARDING THE PROPER COMPUTATION OF "BUSINESS LINES" UNDER THE FCC'S RULE 7

II. THE FIFTH CIRCUIT WAS CORRECT ON THE MERITS 11

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Covad Communications Corp. v. *FCC*,
450 F.3d 528 (D.C. Cir. 2006) 3, 7

Michigan Bell Telephone Co. v. *Lark*,
2007 WL 1343691 (E.D. Mich. 2007) 8

Michigan Bell Telephone Co. v. *Lark*,
2007 WL 2868633 (E.D. Mich. 2007) 8

United States v. *Dalm*,
494 U.S. 596 (1990) 8

STATUTES, RULES, & REGULATIONS

47 U.S.C. § 251(c)(3) 3

47 U.S.C. § 251(d)(2) 3

47 C.F.R. § 51.5 ..... *passim*

47 C.F.R. § 51.319(a) 3, 4

47 C.F.R. § 51.319(a)(4) 4

47 C.F.R. § 51.319(a)(5) 4

47 C.F.R. § 51.319(e) 3

47 C.F.R. § 51.319(e)(2) 4

Supreme Court Rule 10 11

TABLE OF AUTHORITIES

Page

OTHER AUTHORITIES

In re Unbundled Access to Network Elements, 20 FCC Rcd. 2533 (2005) ("*Triennial Review Remand Order*" or "TRRO"), *aff'd, Covad Comms Corp.* v. *FCC*, 450 F.3d 528 (D.C. Cir. 2006) ..... *passim*

E. GRESSMAN, ET AL., SUPREME COURT PRACTICE (9th ed. 2007) 7, 11

Final Order Resolving Disputed Issues, Re Momentum Telecom, Inc., 2006 WL 1752312 (Ala. Pub. Serv. Comm'n Apr. 20, 2006) 9

Order, Southwestern Bell Tel., L.P. d/b/a AT&T Ark. v. Nuvox Communications of Ark., Inc., 2007 WL 4694628 (Ark. P.S.C. Oct. 8, 2007) 9

Application of Pacific Bell Tel. Co. d/b/a SBC Cal. for Generic Proceeding to Implement Changes in Federal Unbundling Rules Under Sections 251 and 252 of the Telecommunications Act of 1996, 2006 WL 238404 (Cal. P.U.C. Jan. 26, 2006) 9

Order No. 13836, Re Verizon Wash., DC, Inc., 2005 WL 3541003 (D.C. Pub. Serv. Comm'n Dec. 15, 2005) 10

TABLE OF AUTHORITIES

Page

In re: Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting From Changes in Law by BellSouth Telecommunications, Inc., 2006 WL 656737 (Fla. Pub. Serv. Comm'n Mar. 2, 2006) 9

Order on Remaining Issues, In re: Generic proceeding to Examine Issues Related to BellSouth Telecommunications, Inc.'s Obligations to Provide Unbundled Network Elements, 2006 WL 758303 (Ga. Pub. Serv. Comm'n (Feb. 7, 2006) 9

Arbitration Decision, Access One, Inc., et al.'s Petition for Arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996 with Ill. Bell Tel. Co. to Amend Existing Interconnection Agreements to Incorporate the Triennial Review Order and the Triennial Review Remand Order, 2005 WL 3359097 (Ill. Commerce Comm'n Nov. 2, 2005) 9

Order, In re Ill. Bell Tel. Co., 2006 WL 4049768 (Ill. Commerce Comm'n Dec. 6, 2006) 9

TABLE OF AUTHORITIES

Page

Order, In the Matter of the Ind. Utility Regulatory Commission's Investigation of Issues Related to the Implementation of the Federal Communication Commission's Triennial Review Remand Order and the Remaining Portions of the Triennial Review Order, 2006 WL 618004 (Ind. Util. Regulatory Comm'n Jan. 11, 2006) 9

Order Determining Proper Method for Fiber-Based Collocator and Business Line Counts, In the Matter of the Complaint of Post-Interconnection Dispute Resolution of Southwestern Bell Tel. L.P. Against NuVox Communications of Kan., Inc. Regarding Wire Center UNE Declassifications, 2006 WL 2360900 (Kan. Corp. Comm'n June 2, 2006) 10

Order Denying Petitions for Reconsideration, In the Matter of the Complaint of Post-Interconnection Dispute Resolution of Southwestern Bell Tel., L.P. Against NuVox Communications of Kan., Inc. Regarding Wire Center UNE Declassifications, 2006 WL 2794797 (Kan. Corp. Comm'n July 20, 2006) 9

Order No. U-28356 (cons. with Order No. U-28131), In re: Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Change-of-law, 2006 La. PUC LEXIS 250 (July 25, 2006) 10

TABLE OF AUTHORITIES

Page

Final Order, In Re: Order Establishing Generic Docket to Consider Change-of-Law to Existing Interconnection Agreements, 2006 Miss. PUC LEXIS 680 (Oct. 20, 2006) 10

Report and Order, In the Matter of the Application of NuVox Communications of Missouri, Inc. for an Investigation into the Wire Centers that AT&T Missouri Asserts are Non-Impaired Under the TRRO, 2008 WL 1795031 (Mo. Pub. Serv. Comm'n Mar. 31, 2008) 10

Order No. 24, 723, Verizon New Hampshire, Supplemental Wire Centers Qualifying for Relief from Certain Unbundled Services, 2007 N.H. PUC LEXIS 2 (Jan. 5, 2007) 10

Arbitration Award, In the Matter of the Establishment of Terms and Conditions of an Interconnection Agreement Amendment Pursuant to the Federal Communication's Commission's Triennial Review Order and its Order on Remand, 2005 WL 3018712 (Ohio P.U.C. Nov. 9, 2005) 10

Finding and Order, In the Matter of the Petition of XO Communications, Inc. Requesting a Commission Investigation of Those Wire Centers that AT&T Ohio Asserts are Nonimpaired, Case No. 05-1393-TP-UNC, 2006 WL 1540270 (Ohio P.U.C. June 6, 2006) 10

TABLE OF AUTHORITIES

Page

Order on Reconsideration, In re Covad Communications Co., UM 1251, 2007 WL 2236375 (Or. P.U.C. July 31, 2007)..... 11

Order Addressing Changes of Law, Re BellSouth Telecommunications, Inc., 2006 WL 2388163 (S.C. Pub. Serv. Comm'n Mar. 10, 2006)..... 10

Report and Order, In the Matter of Investigation of Qwest Wire Center Data, 2006 WL 4043040 (Utah Pub. Serv. Comm'n Sept. 11, 2006) 10

BRIEF IN OPPOSITION OF RESPONDENT AT&T TEXAS

The FCC Rule defining "business line" states that in computing the number of business lines in an incumbent local exchange carrier's ("ILEC's") wire center, one must include "the sum of all UNE loops connected to that wire center."[1] 47 C.F.R. § 51.5. ("UNE" stands for unbundled network element.) The FCC's Rule also provides that for high-capacity digital loops, which can carry multiple voice-grade lines or "64 kbps-equivalents" at once, "each 64 kbps-equivalent" "shall" count as one business line. *Ibid.* Based on the plain language of the FCC's Rule and the FCC's explanation of the rule in its *Triennial Review Remand Order* ("*TRRO*"),[2] the Fifth Circuit concluded that Rule § 51.5 requires business line counts to include "all UNE loops" and "each" 64 kbps-equivalent on high-capacity loops.

Petitioner Logix Communications, L.P. ("Logix") now seeks certiorari, but presents no conceivable basis for review. There is no conflict among circuits, for the Fifth Circuit is the only court of appeals to have addressed this issue. There is no conflict among federal district courts, for every district court to have addressed the issue agrees with the Fifth Circuit. There is not even a conflict among state public utility commissions, for sixteen state commissions have

---

[1] Generally speaking, a wire center is the geographic area served by a telephone company's local switch.

[2] Order on Remand, *In re Unbundled Access to Network Elements*, 20 FCC Rcd. 2533 (2005), *aff'd, Covad Commc'ns Corp. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

agreed with the Fifth Circuit's and the Texas Commission's approach while only one has not. Taken together, that makes the scorecard of decisions 21-1 in favor of the Fifth Circuit's and AT&T Texas' position. Moreover, a petition for reconsideration of the FCC's rule on computing "business lines" remains pending at the FCC, so even if there were any legitimate basis for disagreement over how to read the FCC's rule (which there is not), the FCC could resolve it.

The Fifth Circuit's decision also is plainly correct. FCC Rule 51.5 states that the number of "business lines" in a wire center "shall" include "the sum of all UNE loops" and "shall" count "each" 64 kbps-equivalent as one business line. There is no ambiguity in the rule and no basis for petitioner's position that the rule includes only those UNE loops and 64 kbps-equivalents that are actually being used to provide switched voice service to a business customer. The Fifth Circuit correctly interpreted the rule as written: "all" means all, "shall" means shall, and "each" means each. This reading of the rule also is consistent with the FCC's decision to rely on "an objective set of data that incumbent LECs already have created for other regulatory purposes" and that is "readily confirmable by competitors." *TRRO*, ¶¶ 104-105, 108. Incumbent LECs already provide the FCC with various reports that reflect the number of "all UNE loops" provided by the incumbent and the number of 64 kbps equivalents in the incumbent's high-capacity loops, but do not (and typically cannot) separately identify the number of UNE loops or 64 kbps-equivalents that are used to serve business customers alone.

STATEMENT OF THE CASE

The federal Telecommunications Act of 1996 ("Act" or "1996 Act") authorizes the FCC to require incumbent LECs, like AT&T Texas, to "unbundle" certain of their "network elements" and lease them to CLECs, like Logix, for use in providing competing local services. 47 U.S.C. § 251(c)(3). Types of network elements include loops (the wires that connect a customer's home or business to the incumbent LEC's local switch) and interoffice transport (cables that connect switches to one another). 47 C.F.R. §§ 51.319(a) & (e). An incumbent LEC can be required to unbundle a network element for CLECs only if the FCC finds, at a minimum, that CLECs would otherwise be "impaired" in their ability to compete with the incumbent. 47 U.S.C. § 251(d)(2). The FCC applies the "impairment" requirement to establish rules that determine whether, and under what conditions, specific network elements must be unbundled. *Ibid.*; *TRRO*, ¶¶ 20-24. The FCC's rules are then implemented and enforced by state public utility commissions. The FCC established its latest set of unbundling rules in its *TRRO* in February 2005. Those rules, including the business line rule, were upheld on appeal. *Covad Commc'ns Corp.* v. *FCC*, 450 F.3d 528, 541-546 (D.C. Cir. 2006).

With regard to an incumbent LEC's high-capacity loops and interoffice transport facilities, the FCC decided that there is no impairment, and thus no unbundling requirement, where the revenue opportunities for CLECs in a given geographic area are sufficient to enable them to deploy their own high-capacity loops and interoffice transport. *TRRO*, ¶¶ 43, 87-92, 146-156. Because there is no precise way to measure revenue opportunities, the FCC de-

cided that whether "impairment" exists in a wire center would be determined by two objective proxy measures. *Id.*, ¶¶ 87-93, 103, 167-173. These proxies are: (i) the number of "fiber-based collocators" in the wire center (which is not at issue here), and (ii) the number of "business lines" served by the wire center. *Id.*, ¶¶ 93, 167. The FCC then used these proxies to establish bright-line thresholds that determine whether incumbent LECs have to unbundle their high-capacity loops and interoffice transport. 47 C.F.R. §§ 51.319(a)(4)-(5) and (e)(2)(ii)-(iv). For example, a DS1 interoffice transport facility does not have to be unbundled if the wire centers at both ends of the cable have at least four fiber-based collocators, at least 38,000 business lines, or both. 47 C.F.R. §§ 51.319(a)(4) and (5); *TRRO*, ¶¶ 66, 146.

The FCC's definition of "business line" in Rule 51.5 provides detailed instructions for computing the number of "business lines" in a wire center. Rule 51.5 provides that "[t]he number of business lines in a wire center shall equal the sum of all incumbent LEC business switched access lines, plus the sum of *all UNE loops* connected to that wire center, including UNE loops provisioned in combination with other unbundled elements." 47 C.F.R. § 51.5 (emphasis added). The rule also deals with how to count "business lines" on high-capacity facilities, such as DS1 and DS3 facilities. Such facilities have the capacity to carry the equivalent of many individual voice-grade lines, or, in engineering terms, "64 kbps-equivalents." A DS1, for example, can carry 24 64 kbps-equivalents. C.A. R. 21, Ex. 13 at 15. The FCC's rule states that incumbent LECs "shall account" for such loops "by counting *each* 64 kbps-equivalent" channel in the loop as one "business line": "For example, a DS1 line corresponds to 24 64

kbps-equivalents, and therefore to 24 'business lines.'" 47 C.F.R. § 51.5 (emphasis added).

Counting "all UNE loops" and "each 64 kbps-equivalent" as "business line[s]" will inevitably result in some lines being counted as "business lines" even though they do not actually serve a business customer. The FCC, however, was well aware that its rule could never be perfect and would necessarily lead to some over- or under-inclusiveness. *TRRO*, ¶¶ 88, 94, 104, 155, 169. Nevertheless, the FCC chose to adopt a rule that was easy to administer rather than seeking absolute precision. Specifically, the FCC selected its method for computing "business lines," even though it conceivably could include some lines that serve non-business customers, because it relies on "an objective set of data that incumbent LECs already have created for other regulatory purposes" and that is "readily confirmable by competitors." *Id.*, ¶¶ 105, 108. Incumbent LECs already provide the FCC with various reports that reflect the number of "all UNE loops" provided by the incumbent and the number of 64 kbps-equivalents in the incumbent's high-capacity loops. C.A. R. 21, Ex. 13 at 9, 12, 15-16 & Ex. 14 at 15. By contrast, incumbent LECs do not (and typically cannot) separately identify and report the number of UNE loops or 64 kbps-equivalents that serve business customers only. C.A. R. 21, Ex. 13 at 12-13, 15-16 & Ex. 14 at 14, 16.

Relying exclusively on reported, verifiable data allowed the FCC to be "confident in the accuracy of the thresholds" it established in its unbundling rules and to ensure a "simplified ability to obtain the necessary information" when applying the rule to specific wire centers. *TRRO*, ¶ 105. This advanced the FCC's overarching goal of making a "bright-line rule"

that was "self-effectuating" and "readily administered" by carriers and state commissions. *Id.*, ¶¶ 3, 4, 93, 105, 108, 169.

The FCC gave state public utility commissions the task of implementing the rules in the *TRRO*. *Id.*, ¶ 233. AT&T Texas (known as SBC Texas at the time) initiated a proceeding at the Public Utility Commission of Texas to address implementation of the rules regarding whether and where AT&T Texas is required to unbundle high-capacity loops and interoffice transport facilities. AT&T Texas maintained that the FCC's business line rule required it to count "all UNE loops" and all 64 kbps-equivalents on high-capacity loops as "business lines." The Texas Commission agreed. Pet. App. 30a-32a, 35a-36a. Petitioner challenged that decision in district court and at the Fifth Circuit, but lost both times.

REASONS FOR DENYING THE PETITION

There is no reason for this Court to review the Fifth Circuit's decision. *First,* there is no conflict between circuits on the proper interpretation of the FCC's business line rule, for only the Fifth Circuit has addressed this issue. Indeed, there is no conflict at any level, for all of the federal district courts that have ruled on the issue agree with the Fifth Circuit, as do all but one of the state public utility commissions that have ruled on the issue. Moreover, review would be premature because the same issue remains pending before the FCC on a petition for reconsideration of the *TRRO*.

Second, the Fifth Circuit's decision is plainly correct. The Fifth Circuit interpreted Rule 51.5 according to its plain language: interpreting "all" to mean all, "shall" to mean shall, and "each" to mean each.

The Fifth Circuit's decision also allows the FCC's rule to be implemented by using only objective, readily available data, as the FCC intended.

I. THERE IS NO CONFLICT REGARDING THE PROPER COMPUTATION OF "BUSINESS LINES" UNDER THE FCC'S RULE

The Fifth Circuit is the only court of appeals to have addressed how to compute the number of "business lines" in a wire center under the FCC's Rule. While petitioner tries (at 22) to conjure a conflict by citing the D.C. Circuit's decision in *Covad Communications Corp.* v. *FCC*, 450 F.3d 528 (D.C. Cir. 2006), the issue of how to count business lines was not before the D.C. Circuit and not addressed in the D.C. Circuit's opinion. The D.C. Circuit addressed various challenges to the FCC's unbundling rules on high-capacity loops and interoffice transport, but none of them involved the counting methodology for business lines. *See Covad*, 450 F.3d at 537-38, 543, 548 (describing issues raised). The language petitioner cites for a purported "conflict," Pet. 22, is mere dicta in a footnote and has nothing to do with any issue before that court or with the methodology for counting business lines.[3]

---

[3] To grant certiorari, "there must be a real or 'intolerable' conflict on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized." E. GRESSMAN, ET AL., SUPREME COURT PRACTICE 241 (9th ed. 2007). *See also United States* v. *Dalm*, 494 U.S. 596, n.2 (1990) (Stevens, J., dissenting) ("no relevant conflict exists" because the Court of Appeals did not "sp[eak] to the question at issue here," and "to the extent it did so, its remarks were obviously dicta").

Furthermore, there is a good reason why the parties in *Covad* did not raise the issue of how to compute business lines under the FCC's rule: various CLECs had already raised that very issue in a petition for reconsideration of the *TRRO* that was then pending (and is still pending) before the FCC. C.A. R. 21, Ex. 12. Accordingly, to the extent there could be any legitimate debate over how to properly count business lines under the FCC's rule (which there cannot), the FCC itself can resolve it.

Not only is there no conflict among decisions at the circuit court level, there is no conflict at any level. Aside from the decision affirmed by the Fifth Circuit, only two district courts have addressed how to compute "business lines," under the FCC's rule, and both reached the same result as the Fifth Circuit. *Michigan Bell Tel. Co.* v. *Lark,* 2007 WL 1343691, at *3 (E.D. Mich. 2007) (No. 06-12374) ("The Court declines to transform the unambiguous phrase 'all UNE loops' to mean only some UNE loops"); *Michigan Bell Tel. Co.* v. *Lark,* 2007 WL 2868633, at *9 (E.D. Mich. 2007)(No. 06-11982) (Court refused to "ignore[] the plain language of the regulation, and transform[] an otherwise unambiguous phrase, 'all UNE loops,' to mean only some UNE loops").

Similarly, in addition to Texas, *sixteen* other state public utility commissions (Alabama, Arkansas, California, Florida, Georgia, Illinois, Indiana, Kansas, Louisiana, Mississippi, Missouri, New Hampshire, Ohio, South Carolina, Utah, and Washington, D.C.) have interpreted the FCC's business line rule

in the same way as the Fifth Circuit,[4] while only *one*,

---

[4] Final Order Resolving Disputed Issues, Re Momentum Telecom, Inc., 2006 WL 1752312 (Ala. Pub. Serv. Comm'n Apr. 20, 2006); Order, Southwestern Bell Telephone, L.D. d/b/a AT&T Arkansas v. Nuvox Communications of Arkansas, Inc., 2007 WL 4694628 (Ark. P.S.C. Oct. 8, 2007); Decision 06-01-043, Application of Pacific Bell Telephone Co., d/b/a SBC Cal. for Generic Proceeding to Implement Changes in Federal Unbundling Rules Under Sections 251 and 252 of the Telecommunications Act of 1996, 2006 WL 238404 (Cal. P.U.C. Jan. 26, 2006); Order No. PSC-06-0172-FOF-TP, In re: Petition to establish generic docket to consider amendments to interconnection agreements resulting from changes in law, by BellSouth Telecommunications, Inc., 2006 WL 656737 (Fla. Pub. Serv. Comm'n Mar. 2, 2006); Order on Remaining Issues, In re: Generic proceeding to Examine Issues Related to BellSouth Telecommunications, Inc.'s Obligations to provide Unbundled Network Elements, 2006 WL 758303 (Ga. Pub. Serv. Comm'n Feb. 7, 2006); Arbitration Decision, Access One, Inc., et al.'s Petition for Arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996 with Illinois Bell Tel. Co. to Amend Existing Interconnection Agreements to Incorporate the Triennial Review Order and the Triennial Review Remand Order, 2005 WL 3359097 (Ill. Commerce Comm'n Nov. 2, 2005); Order, In re Illinois Bell Tel. Co., 2006 WL 4049768 (Ill. Commerce Comm'n Dec. 6, 2006); Order, In the Matter of the Indiana Utility Regulatory Commission's Investigation of Issues Related to the Implementation of the Federal Communication Commission's Triennial Review Remand Order and the Remaining Portions of the Triennial Review Order, 2006 WL 618004 (Ind. Util. Regulatory Comm'n Jan. 11, 2006); Order Determining Proper Method for Fiber-Based Collocator and Business Line Counts, In the Matter of the Complaint of Post-Interconnection Dispute Resolution of Southwestern Bell Tel. L.P. Against NuVox Communications of Kan. Inc. Regarding Wire Center UNE Declassifications, 2006 WL 2360900 (Kansas Corp. Comm'n June 2, 2006); Order Denying Petitions for Reconsideration, In the Matter of the Complaint of Post-Interconnection Dispute Resolution of Southwestern Bell Tel. L.P. Against NuVox Communications of Kan. Inc. Regarding Wire Center UNE Declassifications, 2006

North Carolina, has disagreed.[5] The existence of a

WL 2794797 (Kan. Corp. Comm'n July 20, 2006); Order Nos. U-28356, U-28131, In re: Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Change-of-Law, 2006 La. PUC LEXIS 250 (July 25, 2006); Final Order, In Re: Order Establishing Generic Docket to Consider Change-of-Law to Existing Interconnection Agreements, 2006 Miss. PUC LEXIS 680 (Oct. 20, 2006); Report and Order, In the Matter of the Application of NuVox Communications of Missouri, Inc. for an Investigation into the Wire Centers that AT&T Missouri Asserts are Non-Impaired Under the TRRO, 2008 WL 1795031 (Mo. Pub. Serv. Comm'n Mar. 31, 2008); Order No. 24, 723, Verizon N.H. Supplemental Wire Centers Qualifying for Relief from Certain Unbundled Services, 2007 N.H. PUC LEXIS 2 (Jan. 5, 2007); Arbitration Award, In the Matter of the Establishment of Terms and Conditions of an Interconnection Agreement Amendment Pursuant to the Federal Communication's Commission's Triennial Review Order and its Order on Remand, 2005 WL 3018712 (Ohio P.U.C. Nov. 9, 2005); Finding and Order, In the Matter of the Petition of XO Commc'ns, Inc. Requesting a Commission Investigation of Those Wire Centers that AT&T Ohio Asserts are Nonimpaired, Case No. 05-1393-TP-UNC, 2006 WL 1540270 (Ohio P.U.C. June 6, 2006); Order Addressing Changes of Law, Re BellSouth Telecommunications, Inc., 2006 WL 2388163 (S.C. Pub. Serv. Comm'n, Mar. 10, 2006); Report and Order, In the Matter of Investigation of Qwest Wire Center Data, 2006 WL 4043040 (Utah Pub. Serv. Comm'n Sept. 11, 2006); Order No. 13836, Re Verizon Wash., DC, Inc., 2005 WL 3541003 (D.C. Pub. Serv. Comm'n Dec. 15, 2005).

[5] Petitioner claims that the Oklahoma and Oregon state commissions have ruled differently from the Fifth Circuit, but that is incorrect. The Oklahoma "decision" that petitioner cites (Pet. 21) is merely the recommendation of an Arbitrator and has no effect unless and until approved by the full Oklahoma Commission, which it has not been. And while the Oregon Commission initially did not allow all 64 kbps-equivalents to count as "business lines," Pet. 20, it later reversed course and approved a settlement that allows all 64 kbps-equivalents to count as business lines, stating that this was "a reasonable interpretation of the

single outlier decision, especially one at the state commission level that is subject to correction by the commission itself or lower courts, is not a compelling reason to grant certiorari.[6] *See* Rule 10; E. GRESSMAN, ET AL., SUPREME COURT PRACTICE 256 (9th ed. 2007).

II. THE FIFTH CIRCUIT WAS CORRECT ON THE MERITS

Lacking any conflict, petitioner asks the Court to review the Fifth Circuit's decision because petitioner believes it was wrongly decided. That alone is not sufficient to grant certiorari, see Rule 10, but more importantly it is not true. Rule 51.5 sets forth the FCC's instructions for how to compute "business lines" in a wire center, and it provides that business line tallies "shall" include "the sum of all UNE loops connected to that wire center" and "each 64 kbps-equivalent."

The Fifth Circuit interpreted the rule according to its plain language, finding that (1) the FCC's instruction to count "all UNE loops" as "business lines" means just what it says – that all UNE loops are included in the business line count, and (2) the FCC's instruction to count "each" 64 kbps-equivalent circuit in a digital loop as a "business line" means just what it says – that each 64 kbps-equivalent counts as one business line.

TRRO." Order on Reconsideration, In re Covad Commc'ns Co., UM 1251, 2007 WL 2236375, *5-*6 (Or. Pub. Util. Comm'n, July 31, 2007).

[6] Petitioner criticizes AT&T Texas' North Carolina affiliate for not appealing that decision. Pet. 22. AT&T North Carolina did not appeal because the decision had little or no real-world effect on its resulting unbundling obligations.

There is no ambiguity in the FCC's rule. Indeed, the structure of the sentence referring to "all UNE loops" confirms that the FCC knew how to indicate that a line must actually serve a business customer in order to count, but deliberately did not impose that limitation for UNE loops. In the sentence of Rule 51.5 that defines how "business lines" are to be computed, the FCC used the word "business" as a qualifier for the separate component of "incumbent LEC business switched access lines" but conspicuously did not use it before "UNE loops." Similarly, in the *TRRO* the FCC explained that its rule is based on the sum of "ARMIS 43-08 *business* lines [*i.e.*, the incumbent's lines serving its business customers], plus *business* UNE-P, plus UNE-loops." *TRRO*, ¶ 105 (emphasis added). As the Fifth Circuit observed: "The FCC knew how to demarcate lines used to serve businesses and did not do so in the case of UNE loops." Pet. App. 6a.

There also is no ambiguity regarding 64 kbps-equivalents. While petitioner argues that the FCC's rule merely says that a 64 kbps-equivalent counts as one "line," not necessarily a "business line," Pet. 18, the plain language of the FCC's rule refutes that claim. A DS1 digital loop can carry a maximum of 24 64 kbps-equivalents. Not all of those circuits will necessarily be used, and those that are used will not necessarily be used for business customers. Nevertheless, the FCC's rule expressly states that "a DS1 line corresponds to 24 64 kbps-equivalents, *and therefore to 24 'business lines.'*" 47 C.F.R. § 51.5 (emphasis added). As the Fifth Circuit observed, "[n]owhere does this example require separating the 24 lines into those that serve business customers and those that do not. Instead, it seems to illustrate just the opposite result by requiring that each 64 kbps-

equivalent should be counted as a separate line without reference to its use." Pet. App. 10a.

Finally, counting all UNE loops and 64 kbps-equivalents as "business lines" is consistent with the FCC's requirement to rely only on data that is objective, verifiable, readily available, and reported by the incumbent LEC. *TRRO*, ¶¶ 105, 108. It is undisputed that incumbent LECs do report, for other regulatory purposes, their total number of all UNE loops and 64 kbps-equivalents on high-capacity loops, but do *not* separately identify and report the number of UNE loops or 64 kbps-equivalents used only to serve business customers. C.A. R. 21, Ex. 13 at 12 & Ex. 14 at 15-16; Pet. App. 16a-19a. The Fifth Circuit thus properly rejected petitioner's interpretation of Rule 51.5 because – contrary to the FCC's design – it would require ILECs to obtain information from CLECs regarding whether loops are being used to provide residential or business service, data or voice service, and switched or non-switched service. Pet. App. 7a-8a. The FCC expressly rejected this type of line-by-line analysis and reliance on CLEC-provided data because it would be "exceedingly difficult" and "impractical and unadministrable." *TRRO*, ¶¶ 157-159. The Fifth Circuit's decision is therefore consistent with the FCC's intent as well as the plain language of the FCC's rule.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JOSEPH E. COSGROVE, JR.
THOMAS J. HORN
AT&T Texas
400 West 15th Street
Suite 1030
Austin, TX 78701
(512) 870-5700

THEODORE A. LIVINGSTON
Counsel of Record
J. TYSON COVEY
KARA K. GIBNEY
Mayer Brown LLP
71 South Wacker Dr.
Chicago, IL 60606
(312) 782-0600

AUGUST 2008